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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1281

GRACE B. MARTIN AND CELIA KING,
Petitioners,

vs.

MARIAN SCHILLO, ADELE SCHILLO AND DOROTHY S. FISCHER

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

EDWARD H. S. MARTIN,
Counsel for Petitioners.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

To the Supreme Court of the United States:

Your petitioners, Grace B. Martin and Celia King, jointly and severally, pray that a writ of certiorari issue to review the judgment entered March 21, 1944 (R. 67), by the Supreme Court of Illinois in this cause.

Summary Statement of the Matter Involved

This cause involves the right of petitioners herein under the due process clause of Section 1 of the 14th Amendment to the Federal Constitution, to the protection of their title to real estate acquired by them as innocent purchasers for value without notice through a sheriff's sale on special execution of attached real estate owned by respondents

herein at the time of the levy of the attachment. The writ of attachment (R. 9) was issued at the suit of Edward H. S. Martin vs. respondents, in the Superior Court of Cook County, Illinois, based on his affidavit (R. 7) alleging several grounds of attachment in the alternative, except as to respondent Fischer, as to whom a single ground was alleged. Notice was published in accordance with the Illinois Attachment Act (R. 12), and it is admitted that copies of said notice (R. 11), mailed by the Clerk in accordance with the statute, were received by respondents Adele Schillo and Dorothy S. Fischer, but respondent Marian Schillo did not receive a copy of the published notice mailed by the Clerk to an incorrect address in New York City, instead of to the address given in the attachment affidavit. However, in the final judgment (R. 13) in the attachment suit, in which Martin petitioner here was a party, the court found that all three of said respondents "have been duly notified of the pendency of this suit by publication of notice and mailing a copy of same to each of them pursuant to statute in such case made and provided." That judgment was entered August 5, 1942. The special execution (R. 14-15) was issued August 7, 1942, and by the return of the sheriff thereon it appears that he sold the attached real estate by virtue thereof at public sale to petitioner Grace B. Martin for $2770.69, in full satisfaction of the said execution, and issued certificate of sale to her. December 18, 1943, the redemption period having expired, petitioner Grace B. Martin having sold and assigned to petitioner Celia King a one-fifth interest in said certificate of sale and the office of sheriff being vacant, the coroner of said Cook County executed and delivered a deed (R. 20) of said real estate to petitioners, one-fifth interest therein to Celia King and four-fifths interest to Grace B. Martin, said Celia King having paid $1500 for her said interest (R. 33).

February 16, 1944, the respondents here filed their petition (R. 16) in said attachment suit, reciting said judgment, special execution, sheriff's sale and coroner's deed, and alleging they were all void because (a) the affidavit for attachment alleged grounds in the alternative, (b) because of the misdirecting and failure of Marian Schillo to receive the notice mailed June 27, 1942, (c) because the publication notice did not state the attachment writ was executed or returned by the sheriff, and (d) because the undivided interests of the defendants were not sold separately. Said petition also alleges upon information and belief that petitioners here were not purchasers for value without notice, but knew, or were charged with notice of, all defects in the proceeding and that the judgment, sale and deed were void; admits that petitioners here are in possession of said real estate through their agent and receiving the rentals thereof; denies (Par. 8) respondents here are indebted to the plaintiff in the amount of said judgment, but states they are willing to pay the reasonable value of his services; prays (a) that petitioners here be made additional defendants; (b) that said judgment, sale and deed be declared null and void and said judgment be vacated; (c) that petitioners here be directed to execute a quit-claim deed conveying all interest in said real estate to respondents here; (d) that said agent be restrained from paying the proceeds of rent to plaintiff or petitioners here; (e) that respondents here be given leave to answer the complaint; and (f) for general relief in equity.

Said Superior Court entered an order March 10, 1944 (R. 24), making the petitioners here and their said agent parties. March 23, 1944 (R. 30), petitioners here moved to strike said petition in said Superior Court and dismiss the same for insufficiency in law and want of jurisdiction, alleging various reasons, including want of jurisdiction of

said Superior Court to grant relief against petitioners here on said petition filed more than thirty days after final judgment and after expiration of the time for review on appeal or writ of error; that granting the relief prayed or any part thereof would deprive petitioners here of property without due process of law, contrary to Section 1 of the 14th Amendment to the Federal Constitution; that the affidavit for attachment is in law sufficient and the allegation of grounds in the alternative was in accordance with the statute; that in view of the findings in the judgment it must be presumed that a valid affidavit for attachment was filed and that a copy of said notice was duly mailed to said Marian Schillo; that it was not necessary that said notice should have alleged the attachment writ was executed or returned; that the matters alleged in the petition are not proper as a basis for relief under motion in the nature of writ of error *coram nobis;* that it appears from the relief prayed that said petition of respondents here is a proceeding in chancery and respondents here have no right to prosecute the same in the attachment suit; that the alleged defects are such at most as merely to render the proceedings and judgment voidable, and not void, and therefore there was sufficient basis for the judgment.

April 25, 1944 (R. 33-34), said motion of petitioners here was overruled and April 26, 1944, they filed an answer, alleging (R. 32-33, and by reference R. 25-28) that the consideration paid for said property was adequate and sufficient to satisfy the judgment and execution in full, and as against respondents here, the value of said property at the time of the sale did not exceed the amount of sale; that Adele Schillo and Dorothy S. Fischer were each duly served with and received a copy of the publication notice, and it was recited in the judgment the court had jurisdiction of each and all of the respondents here by due publication and mail-

ing of notice; that the affidavit for attachment was sufficient to give the court jurisdiction; that the published notice was sufficient to give the court jurisdiction over respondents here; denies the allegations of want of jurisdiction contained in the petition of respondents here; alleges that relying on said judgment Grace B. Martin paid value at the sheriff's sale as recited in the return on the execution and Celia King paid $1500 for her one-fifth interest, and neither of them knew at the time of sale or deed, nor was charged with notice, of any defect in the proceedings, nor that the judgment, sale and deed were void or alleged to be void; that respondents here knew or had notice during or prior to July, 1942, of the pendency of the attachment proceedings and the attachment of real estate, and were notified of the proposed execution sale prior to sale, and were notified and knew of said sale during or prior to October, 1943; that the allegations in the pleadings on which said judgment was entered are true, and respondents here are no longer indebted to said plaintiff only because said judgment and indebtedness merged therein were fully satisfied by said sheriff's sale; (Par. 11) that after levy of attachment, but before judgment, respondents here, by their quit-claim deed without covenants of warranty conveyed to Alma C. McGeogh said real estate, and thereby divested themselves of all interest therein, and by reason of said deed and satisfaction, respondents here have not been harmed or damaged and their petition raises nothing but moot questions; (Par. 12) that the effect of the alleged defects in said petition as amended was at most to make the proceedings voidable, but not void, and not subject to being declared void or set aside on motion or petition not made or filed until more than one year after the entry of judgment; that as said petition was not filed until more than one year after entry of judgment, respondents here have failed to exercise due diligence, have been negligent and

have never had any valid defense against the claim merged in said judgment, and even if the proceedings can be treated as a proceeding in equity, the same furnishes no ground for relief at all nor order, judgment or decree in said cause, instead of in a separate suit or proceeding in equity.

Respondents here filed their motion (R. 35) to strike all except paragraph 11 of the answer of petitioners here, and with it filed their reply (R. 36, 29) to said paragraph 11, admitting the said conveyance to said McGeogh, but alleging that subsequently title was again vested in them by deed from said McGeogh dated January 20, 1944. May 5, 1944, petitioners here filed rejoinder to said reply and therein alleged (R. 36, and by reference R. 31) that respondents here obtained said deed from said McGeogh subsequently to the recording of said coroner's deed and after petitioners here were in possession of said real estate. Order was entered May 5, 1944 (R. 36-7), sustaining motion of respondents here to strike all except paragraph 11 of answer of petitioners here and to strike rejoinder of petitioners here, also carrying back motion to strike said rejoinder to their reply and striking that reply as immaterial, also carrying back said motion to strike to said paragraph 11 of said answer and striking said paragraph as immaterial.

Final order entered May 8, 1944 (R. 37-8), on motion of respondents here, recites that the court finds, orders and adjudges that the court has jurisdiction of the plaintiff and petitioners here; that the writ of attachment and purported levy thereof are null and void because not based on a sufficient affidavit for attachment and because no sufficient notice was published and mailed; that said judgment, special execution, levy and purported sheriff's sale and deed are null and void for want of jurisdiction; that said judgment is vacated and set aside; said execution

quashed and levy thereof declared of no effect; that petitioners here did not acquire and do not have, by virtue of said deed, any right, title or interest in said property.

Petitioners have appealed (R. 38-9) from said order of May 8, 1944, to the Supreme Court of Illinois, claiming there that said final order or decree deprived them of their property without due process of law, contrary to Section 1 of the 14th Amendment to the United States Constitution, and also alleging other grounds for reversal. That court affirmed (R. 59) on the alleged ground that the judgment, sale and deed were null and void for want of jurisdiction over the persons or property of respondents here because of the misdirection and non-receipt of the notice mailed to Marian Schillo certified by the clerk. However, a rehearing was granted (R. 60) by the Illinois Supreme Court, but it again affirmed (R. 67) March 21, 1945, because the attachment affidavit alleged grounds in the alternative (—— Ill. ——, not yet reported. For copies of opinions see appendix (pp. 15, 19)). The opinion did not mention the Federal question, but sought to evade it by basing its decision on a ground obviously untenable and too narrow to eliminate the Federal question.

Jurisdiction

The Federal constitutional question was properly raised in the trial court by motion to dismiss (R. 30), not waived by answer (*Waters* v. *Heaton*, 364 Ill. 150, 153), and in the Illinois Supreme Court by brief (R. 41, 44-5), The overruling of the motion (R. 33-4) and final judgment of the trial court (R. 37-8) and the judgment of affirmance necessarily decided it adversely to petitioners here. Admittedly, on the record, petitioners here are innocent purchasers for value without notice—their pleadings alleging them to be such (R. 33 and by reference R. 26) having been stricken

as immaterial (R. 36-7)—unless the record proper in the Supreme Court showed defects rendering the judgment not merely voidable, but *absolutely void*—for the time for attack based on merely voidable defects had long since expired before petitioners here received their deed. (§§ 1, 2 and 3, Ill. Laws, 1933, p. 678; §§ 82, 83 and 84, Ch. 77, Smith-H. Ill. Ann. Stat., pp. 313-4, substituting thirty days from date of judgment in place of judgment term with respect to finality of judgment, and right to vacate or modify same. *Baldwin* v. *McClelland*, 152 Ill. 42, 49-51; *Trigg* v. *Ind. Com.*, 364 Ill. 581, 587-8; *M. & K. Bk.* v. *C.-C. C. Co.*, 351 Ill. 180, 190-2; *Gray* v. *Ames*, 220 Ill. 251, 255-6; *Tosetti B. Co.* v. *Koehler*, 200 Ill. 369, 372-4; *City* v. *Smale*, 248 Ill. 414, 416-7; In re Met. T. Co., 218 U. S. 312, 320-1; *Brooks* v. *B. & S. R. Co.*, 102 U. S. 107; *Voorhees* v. *Bk. of U. S.*, 35 U. S. 449, 470-8).

As to allegations in the alternative in the attachment affidavit, there are two Illinois statutes which are material and which the Supreme Court of Illinois did not construe nor hold void, but merely ignored. One of these, § 28, Ch. 11, Ill. Rev. Stats., §28, Ch. 11, Smith-H. Ill. Ann. Stats., p. 145, a part of the Attachment Act itself, provides that:

> "No writ of attachment shall be quashed, nor the property taken thereon restored, * * * on account of any insufficiency of the original affidavit, * * * if the plaintiff * * * shall cause a legal and sufficient affidavit * * * to be filed."

In passing on this or a previous similar statute, the Supreme Court of Illinois has held that anything defective which can be amended is not void, but merely voidable, such as defective affidavits in attachment. (*Booth* v. *Rees*, 26 Ill. 45, 48-9; *Hogue* v. *Corbit*, 156 Ill. 540, 544-5.) This applies to an affidavit not positive, but on information and belief. (*Booth* v. *Rees*, 26 Ill. 45, 48-9.) It also applies to a docu-

ment in the form of an affidavit, but having the jurat unsigned. (*Kruse* v. *Wilson*, 79 Ill. 233, 237-8.)

These cases are not *contra* to *Dyer* v. *Flint*, 21 Ill. 80, and *Archer* v. *Claflin*, 31 Ill. 306, cited in the decision of the State Supreme Court, for the latter two were decided on direct review *inter partes*, with no rights of third parties involved, and are inapplicable here.

The other statute is a section of the Illinois Civil Practice Act, expressly authorizing pleading in the alternative and providing that a bad alternative shall not make the other alternatives bad. (§ 43(2), Ch. 110, Ill. Rev. Stats.; Ill. Laws 1933, p. 784, Art. 6, § 43; § 167(2), Ch. 110, Smith-H. Ill. Ann. Stats., p. 270.)

In Illinois there are two sets of pleadings in attachment suits, one on the merits and the other on the attachment. In the latter set, the affidavit for attachment is the plaintiff's first pleading and the answer traversing the attachment affidavit is the first pleading of the defendant.

> "The defendant may answer, traversing the facts stated in the affidavit upon which the attachment issued, which answer shall be verified by affidavit; and if, upon the trial thereon, the issue shall be found for the plaintiff, the defendant may answer the complaint," (§ 27, Ch. 11, Ill. Rev. Stats.; Ill. Laws 1935, p. 210, § 1; Smith-H. Ill. Ann. Stats., 1944 Pocket Part, p. 18.)

As it does not conflict with any provision of the Attachment Act, Section 43 of the Civil Practice Act with respect to pleading in the alternative is made applicable by Rule 2 of the Supreme Court of Illinois, which reads:

> "In the actions referred to by section 1 and subsection (2) of section 31 of the Civil Practice Act, the separate statutes shall control, to the extent to which they regulate procedure in such actions, but the Civil Practice Act shall apply to matters of procedure not so regulated by separate statutes." (355 Ill. 13).

No statement is to be found in the Attachment Act as to whether the grounds for attachment shall be alleged conjunctively or disjunctively.

The Supreme Court of Illinois professedly based its decision on the sole point of alternative allegations. Its decision obviously being untenable on that basis and there remaining no non-Federal ground on which the affirmance could be based, petitioners' contention that they were deprived of their property without due process of law, contrary to the 14th Amendment to the Federal Constitution, was necessarily overruled, and a case is presented which may be reviewed on certiorari. (*Lawrence* v. *Tax Com.*, 286 U. S. 276, 282-3; *Postal T. C. Co.* v. *City*, 247 U. S. 464, 473-6; *Ward* v. *Bd. of County Com.*, 253 U. S. 17, 22-3; *Broad R. P. Co.* v. *State*, 281 U. S. 537, 540-1; *Ancient E. A. O.* v. *Michaux*, 279 U. S. 737, 744-6; *Davis* v. *Wechsler*, 263 U. S. 22, 24-5; *Grayson* v. *Harris*, 267 U. S. 352, 358; *W. C. S. R. Co.* v. *People*, 201 U. S. 506, 519-20; *C. B. & Q. R. Co.* v. *People*, 200 U. S. 561, 579-81; *McCullough* v. *Com. of Va.*, 172 U. S. 102, 109-11, 116-18, 122-3; *Abie S. Bk.* v. *Weaver*, 282 U. S. 765, 773; *Stewart* v. *Michigan*, 232 U. S. 665, 670-1; *Rogers* v. *Alabama*, 192 U. S. 226, 230-1; *Fayerweather* v. *Ritch*, 195 U. S. 276, 277-9; *Brinkerhoff-F. T. & S. Co.* v. *Hill*, 281 U. S. 673, 679-80.)

The fact that Marian Schillo did not receive the notice mailed to her by the clerk at the wrong address is not sufficient to negative the mailing of another notice to her by the clerk within the statutory time limit, which would justify the finding in the attachment judgment (R. 13) that the court had jurisdiction of her by due publication and mailing of notice. By a long line of Illinois decisions, a clerk's certificate of mailing is not the only evidence of mailing, and where insufficient in itself, like an unserved summons, to show proper service, a finding of due service in the judg-

ment is sufficient to show jurisdiction, where, as in the instant case, there was ample time for service of another summons or notice, even though the latter is not found in the files. (*Matthews* v. *Hoff*, 113 Ill. 90, 95-8; *Kuzak* v. *Anderson*, 267 Ill. 609, 613-4; *Pine T. L. Co.* v. *C. S. & G. Exch.*, 238 Ill. 449, 455; *Pierce* v. *Carleton*, 12 Ill. 358, 363-4; *Reedy* v. *Camfield*, 159 Ill. 254, 261; *Stack* v. *People*, 217 Ill. 220, 234; *Sloan* v. *Graham*, 85 Ill. 26, 28-9; *Barnett* v. *Wolf*, 70 Ill. 76, 79-83.)

As to the point that the publication notice was defective in not describing the property levied upon or alleging that the attachment had been levied, such showing is unnecessary in Illinois. (*Pine T. L. Co.* v. *C. S. & G. Exch.*, 238 Ill. 449, 453-4; *Lawver* v. *Langhans*, 85 Ill. 138, 140-1; *Morris* v. *Trustees*, 15 Ill. 266, 270-1.)

The respondents' other point, that the sheriff's sale was void because the undivided interests of the three co-tenants were sold together, instead of separately, is frivolous. No statute requires such interests to be sold separately.

As shown in the authorities first cited herein under "Jurisdiction", when respondents here filed their petition the Superior Court had long since lost jurisdiction of the parties and subject-matter in the suit in which that petition was filed. Therefore, when the Superior Court entertained that petition and sought to deprive petitioners here of their property rights, it deprived them of their property without due process of law, contrary to the 14th Amendment to the Federal Constitution. (*Brinkerhoff-F. T. & S. Co.* v. *Hill*, 281 U. S. 673, 679-80; *C. B. & Q. R. Co.* v. *City*, 166 U. S. 226.)

The Questions Presented

1. Whether, in spite of the prohibition of Section 1 of the 14th Amendment to the Constitution of the United States against deprivation of property without due process of law,

a real estate title acquired through an execution sale and deed thereunder by petitioners here—the purchaser for value and her assignee for value—where neither of them was a party to the suit in which that execution issued, nor had notice or knowledge of any defect in that suit, may be held null and void and the judgment, sale and deed set aside, where there were no defects in the proceedings which would have rendered them void and not merely voidable.

2. Whether there was any such defect in the suit here involved.

3. Whether, as in the instant suit, after a suit has ended and the trial court according to repeated uniform decisions of the Illinois Supreme Court has lost jurisdiction to vacate its judgment not absolutely void, as distinguished from merely voidable, that trial court may afterwards set aside that judgment and declare void the title previously acquired by innocent purchasers for value, not parties to the suit when acquiring title or previously, who purchased in reliance upon said judgment without notice of anything not appearing of record, and the Supreme Court of the State may disregard its long established rule and affirm such decision, without depriving said purchasers of property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

Reasons Relied On for Allowance of Writ

By affirming the judgment appealed from, the Supreme Court of Illinois has necessarily decided Federal questions of substance in a way not in accord with applicable decisions of the Supreme Court of the United States, namely, the first two questions hereinbefore stated as the questions presented. (*Voorhees* v. *Bk. of U. S.*, 35 U. S. 449, 470-8; *Cooper* v. *Reynolds*, 77 U. S. 308, 315-16, 319-21). Under the Illinois Civil Practice Act (§ 43(2), Ch. 110, Ill. Rev.

Stats.; Ill. Laws 1933, p. 784, Art. 6, § 43; § 167(2), Ch. 110, Smith-H. Ill. Ann. Stats., p. 270), hereinbefore referred to, authorizing pleading in the alternative, the attachment affidavit was not even defective. Under the Illinois Attachment Act (§ 28, Ch. 11, Ill. Rev. Stats.; § 28, Ch. 11, Smith-H. Ill. Ann. Stats., p. 145) and the numerous Illinois decisions hereinbefore cited, such alternative allegations, even if defective, made the judgment voidable only, and not absolutely void. Under a rule of property long adhered to, which could not be departed from without disaster to the vast number of real estate titles derived through court proceedings, the title of innocent purchasers for value without notice of any defects in the proceedings cannot be disturbed on the basis of defects which would render them merely voidable and not absolutely void. This is well established by the Illinois decisions (*Hogue* v. *Corbit,* 156 Ill. 540, 544-5; *Iroquois F. Co.* v. *Wilkin Mfg. Co.,* 181 Ill. 582, 592), as well as the decisions of this Court (*Voorhees* v. *Bk. of U. S.,* 35 U. S. 449, 470-8; *Cooper* v. *Reynolds,* 77 U. S. 308, 315-16, 319-21). Especially is this so when the attack originated long after the time for applying to a court of review or for relief in the trial court term or its equivalent had expired. (Cases first cited under "Jurisdiction" in this petition.)

The necessary effect of said affirmance by the Illinois Supreme Court was to decide a Federal question of substance not theretofore determined by this Court, namely, whether, as in the instant suit, after a suit has ended and the trial court according to repeated uniform decisions of the Illinois Supreme Court, has lost jurisdiction to vacate its judgment not absolutely void, as distinguished from merely voidable, that trial court may afterwards set aside that judgment and declare void the title previously acquired by innocent purchasers for value, not parties to the suit when acquiring title or previously, who purchased in reliance upon

said judgment without notice of anything not appearing of record, and the Supreme Court of the State may disregard its long established rule and affirm such decision, without depriving said purchasers of property without due process of law, in violation of the 14th Amendment to the Constitution of the United States. The decision of such question by this Court, indicating whether such purchasers will be protected by the 14th Amendment aforesaid in relying on such judgments, is of sufficient general importance to make the allowance of certiorari desirable.

The Supreme Court of Illinois cannot, by remaining silent as to the Federal question of due process of law and basing its decision on a non-Federal ground, untenable or not broad enough to sustain its decision, deprive this Court of its right to determine for itself the Federal questions necessarily decided by the judgment of affirmance against the Federal right claimed. (*C. B. & Q. R. Co.* v. *People,* 200 U. S. 561, 579-81; *McCullough* v. *Com. of Va.,* 172 U. S. 102, 109-10, 116-18, 122-3; *W. C. S. R. Co.* v. *People,* 201 U. S. 506, 519-20; *Ward* v. *Bd. of County Com.,* 253 U. S. 17, 22-3).

There was no other non-Federal ground upon which the judgment of the Supreme Court of Illinois was or could have been based broad enough to have sustained that judgment. The failure of Marian Schillo to receive the notice which was misdirected by the clerk was immaterial, in view of the finding in the attachment judgment that the court had jurisdiction by due publication and mailing of notice to each of the defendants. (*Pine T. L. Co.* v. *C. S. & G. Exch.,* 238 Ill. 449, 455; *Vil.* v. *Homesteaders' L. Assn.,* 367 Ill. 508, 512; *Kuzak* v. *Anderson,* 267 Ill. 609, 613.)

Respectfully submitted,

EDWARD H. S. MARTIN,
Attorney for Petitioners.

APPENDIX

Final opinion of Illinois Supreme Court rendered March 21, 1945, in the case in which certiorari is sought, Martin v. Schillo, —— Ill. —— (not yet reported):

Mr. Justice Stone delivered the opinion of the court:

The suit out of which this present controversy grew was filed in the Superior Court of Cook County by appellant Edward H. S. Martin as plaintiff, for an accounting and recovery of attorney's fees claimed due him. The appellees, Marian Schillo, Adele Schillo and Dorothy S. Fischer were made defendants. No personal service was had and on May 16, 1942, Martin filed an affidavit for attachment claiming $2655 to be due him. Notice was given by publication and mailing. Writ of attachment was issued and levied upon the real estate in the city of Chicago involved in this proceeding and owned by the three named defendants as tenants in common.

On August 5, 1942, the trial court found it had jurisdiction of the subject matter and the parties, entered a default judgment for the amount claimed and a special execution was issued on that judgment. On September 15, 1942, the attached real estate was sold by the sheriff for the amount of plaintiff's claim and costs, and the sheriff issued his certificate to Grace B. Martin, wife of the plaintiff. On December 18, 1943, the period of redemption having expired, a sheriff's deed was issued conveying four-fifths of the attached real estate to Grace B. Martin and one-fifth to Celia King, wife of plaintiff's attorney. On February 28, 1944, the defendants in the attachment suit, appellees here, filed a sworn petition seeking to set aside the judgment in attachment, execution, sale and sheriff's deed, on the ground, among others, that the affidavit for attachment was not sufficient to give the court jurisdiction of the subject matter, and that Marian Schillo did not receive a copy of the notice because, as the returned envelope shows, it was mailed to the wrong address, and that for these reasons the judgment was void and all proceedings had thereunder should be set aside. This sworn petition also averred that

the defendants, appellees, did not learn of the judgment, sale of and deed to their real estate until on or about December 30, 1943, some fifteen days after the period of redemption from the sheriff's sale had expired, and that they were nonresidents, residing in Philadelphia. They state further that they immediately came to Chicago, retained counsel, prepared and filed their petition referred to.

Grace B. Martin and Celia King were made parties defendant to the petition by reason of their claimed interest in the real estate and O. H. Knecht Company, a corporation, was made party as the one collecting the rentals from the real estate as the agent of Grace B. Martin and Celia King. Notice of the petition was also served on appellant Martin.

A trial was had before the court upon the pleadings and record and the court held the judgment, sale and deeds null and void on the ground that the court did not have jurisdiction of the subject matter nor of the parties in the attachment suit. The question involved on this appeal is whether such is a correct holding. It is claimed by appellants here that the trial court did have jurisdiction in the attachment suit, hence the judgment of the court in the present proceeding is erroneous. If the trial court in the attachment suit did not have jurisdiction of the subject matter, its judgment in that suit was void and without any effect and may be questioned at any time or place. (*Chicago Title and Trust Co.* v. *Mack*, 347 Ill. 480; *Steenrod* v. *Gross Co.*, 334 Ill. 362; *Armour Grain Co.* v. *Pittsburgh, Cincinnati, Chicago and St. Louis Railroad Co.*, 320 Ill. 156.) Jurisdiction of the subject matter is always conferred by law. *Smith* v. *Herdlicka*, 323 Ill. 585; *People ex rel. Dorris* v. *Ford*, 289 Ill. 550; *Oakman* v. *Small*, 282 Ill. 360.

Attachment proceedings are statutory. To give the court jurisdiction of the subject matter and the parties the statute must be strictly complied with. Appellees say this was not done in this case for two reasons: (1) The affidavit for attachment was in the alternative and therefore insufficient in law to confer jurisdiction of the subject matter, and (2) the record shows on its face that notice was not mailed to Marian Schillo at the address stated in the affidavit, therefore the court did not obtain jurisdiction of her person, and

the judgment being a joint judgment against the three defendants and being void as to her, it is void as to all defendants.

Attachment was unknown at the common law and, being a statutory proceeding, the affidavit required by the statute for the writ must meet all the essential requirements of the statute to give the court jurisdiction of the subject matter. (*Rabbitt* v. *Weber & Co.*, 297 Ill. 491; *Thormeyer* v. *Sisson*, 83 Ill. 188; *Pullian* v. *Nelson*, 28 Ill. 112; *Eddy* v. *Brady*, 16 Ill. 306.) If an essential element of the affidavit is omitted, it may not be aided by amendment, and the proceeding is without authority of law. A judgment entered when the record on its face shows want of jurisdiction is void and of no force or effect. (*Rabbitt* v. *Weber & Co.*, 297 Ill. 491; *Booth* v. *Rees*, 26 Ill. 45.) The rule also is that a purchaser, whether he be a party to the record or a stranger, and all subsequent titleholders are chargeable with notice of the condition of the record and are not protected from the consequences of purchasing under a void judgment or decree. *Rabbitt* v. *Weber & Co.*, 297 Ill. 491; *Morris* v. *Hogle*, 37 Ill. 150.

Section 1 of the Attachment Act, (Ill. Rev. Stat. 1943, chap. 11, par. 1), so far as applicable here, is as follows: "That in any court of record having competent jurisdiction, a creditor * * * may have an attachment against the property of his debtor, or that of any one or more of several debtors, either at the time of instituting the suit or thereafter, when the claim exceeds $20, in any one of the following cases: First: Where the debtor is not a resident of this state. Second: When the debtor conceals himself or stands in defiance of an officer, so that process cannot be served upon him." The affidavit for attachment in this case avers: "said Marian Schillo and Adele Schillo are not residents of this state, or conceal themselves so that process cannot be served upon them, or have departed from this state with the intention of having their effects removed from this state, or are about to remove their property from this state, to the injury of said plaintiff, or have, within two years prior to the filing of this affidavit, fraudulently concealed or disposed of their property so as to hinder and delay their creditors."

It has been held that the disjunctive use of grounds for attachment may be made when such disjunctive averments refer to the same subject matter and are in a sense the expression of but a single ground. (*McCarthy Bros. Co.* v. *McLean County Farmers Elevator Co.*, 18 N. D. 176, 118 N. W. 1049; Shinn on Attachments, 145, p. 137.) But such an affidavit is held not good where the disjunctive averments include other and inconsistent grounds, such as appear in the affidavit here involved, relating to residence or non-residence of a defendant, or that they are concealing themselves, on the one hand, and that they are about to remove their property or have disposed of their property, on the other.

As early as 1859, in *Dyer* v. *Flint*, 21 Ill. 80, it was held that an affidavit for a writ of attachment must allege positively and unequivocally the requirements of the statute. It is not sufficient that such allegations be made on information and belief.

In *Archer* v. *Claflin*, 31 Ill. 306, it was held that the affidavit for attachment in that case was defective in its failure to aver in positive terms the design to depart from the State with intention of taking the defendants' property out of the State to the injury of their creditors. That such averments be positive is necessary to compliance with the statute.

In *Cronin* v. *Crooks*, 143 N. Y. 352, 39 N. E. 268, the warrant of attachment stated two grounds disjunctively. In affirming a judgment vacating the warrant of attachment and directing delivery of the property, that court said: "The provisions of Section 641 of the Code of Civil Procedure were not complied with. They provide, among other things, that the warrant 'must briefly recite the ground of attachment.' This warrant stated no ground, for to state in the alternative is to state neither the one nor the other fact. Such an alternative statement of grounds results in a mutual exclusion." In *Pierce* v. *Boyle*, 242 Mich. 149, 218 N. W. 756, it was held that an affidavit upon which attachment was issued, which stated grounds in the alternative, was fatally deficient. To the same effect are *Alvey* v. *Smith*, 28 S. W. 2d (Tex. Civ. App.) 267; *Heaton* v. *Panhandle Smelting Co.*, 32 Idaho 146, 179 Pac. 510; *Rosenberg* v. *Bul-*

lard, 127 Cal. App. 315, 15 Pac. 2d 870. See, also, 7 C. J. S. 296.

It is readily seen that the affidavit before us does not state which of the grounds therein set out is relied upon to sustain the attachment, and such cannot be ascertained. No positive statement is made whether Marian and Adele Schillo were nonresidents, or concealed themselves so that summons could not be served upon them, or whether they had departed from the State with the intention of having their effects removed from the State, or had within two years fraudulently disposed of their property.

The authorities cited all held that to state separate and distinct grounds for writ of attachment in the alternative or disjunctive is not sufficient to give the court jurisdiction of the subject matter of the attachment for the reason that the affidavit does not positively state any ground.

Attachment is an action *in rem*, a statutory remedy. It is necessary, in order to give the court jurisdiction of the property sought to be attached, that the requisites of the statute be substantially complied with. If there be no such compliance, the court has no jurisdiction of the subject matter, without which any judgment entered pursuant to the levy made under authority of the writ of attachment is void and of no force. In the record before us, we can but conclude that the trial court did not err in sustaining appellees' first objection to the jurisdiction of the court in the attachment suit. This view renders it unnecessary to discuss other points raised. Since the judgment for $2655 was procured on substituted service, it alone cannot stand. The judgment and proceedings had thereunder, including the deeds issued under the attachment and sale by the sheriff, were void. The judgment of the Superior Court is affirmed.

Former opinion of the Illinois Supreme Court in said suit, rendered November 22, 1944, (not reported), vacated by allowance of rehearing:

Mr. Chief Justice Fulton delivered the opinion of the court:

The questions here presented arise upon an appeal from an order of the Superior Court of Cook county which set

aside a default judgment in an attachment suit and declared the special execution, levy, sale and sheriff's deed of the attached real estate void and of no effect. The appeal comes directly to this court inasmuch as a freehold is involved. *Rabbitt* v. *Weber & Co.*, 297 Ill. 491.

No testimony was introduced in the trial court but the case rests entirely on pleadings or matters of record, whereby there is no dispute as to the facts, which may be summarized as follows. This suit was originally commenced by Edward H. S. Martin, as plaintiff, for an accounting and recovery of attorney's fees claimed by him to be due for professional services performed in connection with the sale or attempted sale of certain stock in an estate inherited by defendants, Marian Schillo, Adele Schillo, and Dorothy S. Fischer. Apparently, personal service could not be obtained upon the defendants, so, on May 15, 1942, plaintiff filed an amendment in the form of an affidavit for attachment against the same three defendants. Said affidavit claimed the sum of $2655 to be due and a writ of attachment was thereupon issued and levied on certain real estate in the city of Chicago, Illinois, then owned by said three defendants as tenants in common. No personal service was had upon any of the defendants, but plaintiff filed an affidavit of non-residence as to defendants Marion Schillo and Dorothy S. Fischer, and further swore that defendant Adele Schillo was either a nonresident or concealed herself within the State so that service could not be had upon her.

This constructive service was attempted to be completed by publication of the required notice and the mailing of copies to the addresses of defendants as given in plaintiff's affidavit of nonresidence. On August 5, 1942, a default judgment in the full amount claimed was entered against the three defendants, the trial court finding that defendants had been duly notified of the pendency of the suit by publication of notice and the mailing of a copy to each. A special execution was issued on this judgment, and on September 15, 1942, the attached property was sold by the sheriff, his certificate being issued to Grace B. Martin, wife of the plaintiff. After the period of redemption, the sheriff's deed was issued December 18, 1943, and purported to convey the attached real estate, four-fifths to the same Mrs. Martin and

one-fifth to Celia King, the wife of the attorney for plaintiff.

On February 28, 1944, a sworn petition in this same attachment suit was filed by said Marian Schillo, Adele Schillo and Dorothy S. Fischer (whom we will hereinafter refer to, collectively, as appellees), in which they alleged that they had first learned on or about December 30, 1943—fifteen days after the expiration of the period of redemption from the sheriff's sale—of the attachment judgment and of the sheriff's sale and deed of their real estate; that they were then in Philadelphia and two of them immediately came to Chicago, retained counsel and filed the petition, after having first obtained leave of court on February 16, 1944

After summarizing the proceedings as above outlined, the petition incorporated the entire record of the case up to that time by reference, attached a copy of the sheriff's deed as an exhibit, and alleged that the judgment sale and deed were void for the following reasons:

(1) That in the affidavit for attachment the alleged grounds were stated in the alternative rather than separately and independently, whereby the affidavit was not sufficient to give jurisdiction over appellees.

(2) That although plaintiff's affidavit of nonresidence stated that the last known place of residence of Marion Schillo to be "353 W. 57th Street, New York City, New York," it appears from the clerk's certificate of mailing that the notice was, in fact, mailed to her at "353 W. 47th Street, New York City, New York," and was subsequently returned to the clerk undelivered and unopened. That, accordingly, jurisdiction was not obtained as to said Marion Schillo and the judgment, being void as to her, is entirely void as to all appellees.

(3) That the publication notice recites the issuance of the writ of attachment from the clerk's office but does not state that the return was executed and returned by the sheriff, as required by statute.

(4) That the property was sold as a whole by the sheriff without separation of the interests of appellees and without

regard to the fact that the court had no jurisdiction over some or all of them, and, therefore, no right to levy upon their interests jointly.

Appellees' petition also asked that said Grace B. Martin and Celia King be brought before the court because of their interests in the real estate through the sheriff's deed, and that O. H. Knecht Company, a corporation, be made a party inasmuch as it was collecting rentals from the real estate on behalf of Mrs. Martin and Mrs. King. That was done and notice of the petition was duly served on the additional parties, as well as the original plaintiff, Edward H. S. Martin.

The trial court held that, in view of the matters set forth in appellees' objections (1) and (2), the court originally acquired no jurisdiction over the persons or property of the appellees and, hence, the judgment, sale and deed were null and void. To reverse that judgment this appeal is taken by Edward H. S. Martin, Grace B. Martin and Celia King, whom we will refer to, collectively, as appellants.

Inasmuch as we are fully satisfied that the second objection of appellees above set forth is well taken, and, alone, sufficient to sustain the judgment of the trial court, we will hereafter direct our attention to that point, only. The decisive character of the objection is, in fact, conceded by appellants by the statement in their reply brief that "if it appeared of record that her (Marion Schillo's) correct address was known and no other copy was mailed her at the later address, a judgment against her would be void for want of jurisdiction." Appellants argue, however, that whatever else might appear in the record as to the address where Marian Schillo's notice was mailed, the same is overcome by the finding of the trial court, when it entered judgment for $2655, that "defendants * * * have been duly notified of the pendency of this suit by publication of notice and by mailing a copy of same to each of them pursuant to statute in such case made and provided * * *." In other words, appellants contend that the certification of the clerk that he, in fact, mailed a notice to the wrong address of Marian Schillo, and the appearance in the record

of the sealed envelope containing said notice returned to the clerk undelivered and unopened, must give way to the finding of the trial court, in entering its money judgment, that notice was properly mailed and that the court thus had jurisdiction of the parties to the suit. As already indicated, we cannot agree with such contention because of the very obvious wording of the statute involved and previous decisions of this court upon the same or related questions.

Section 22 of our Attachment Act (Ill. Rev. Stat. 1943, chap. 11, par. 22,) provides for notice by publication when the defendants are nonresidents or cannot be found for process, and concludes as follows: "And such clerk shall, within ten days after the first publication of such notice, send a copy thereof by mail, addressed to such defendant, if the place of residence is stated in such affidavit; and the certificate of the clerk that he has sent such notice in pursuance of this section, shall be evidence of that fact."

Because of our constitutional guaranties of due process, it has always been held by the courts of this State that any statute providing for substituted or constructive service must be strictly complied with. Thus, in *Illinois Valley Bank* v. *Newman*, 351 Ill. 380, where an affidavit for service by publication was held insufficient, it was said: "A party claiming the benefit of a decree upon constructive service must show a strict compliance with every requirement of the statute, and nothing else will invest the court with jurisdiction or give validity to a decree when the same is called in question in a direct proceeding. (*People* v. *Abraham*, 295 Ill. 582; *Boyland* v. *Boyland*, 18 id. 551.) The affidavit upon which service by publication is had under the provisions of the Chancery act is jurisdictional and there must be a strict compliance with the statute." In *Anderson* v. *Anderson*, 229 Ill. 538, the identical question presented in this case was disposed of as follows: "The statute required the clerk, within ten days of the first publication of notice, to mail a copy to the defendant at his last known residence, as stated in the affidavit. (4 Starr & Cur. Stat. 905.) The place stated in the affidavit was 5559 State Street, Chicago, while the notice mailed by the

clerk was sent to 5857 State Street. This was not sufficient to confer jurisdiction."

Notwithstanding the decision just cited, appellants again point to the finding of jurisdiction in connection with original entry of judgment for $2655, and contend that, in view thereof, it must be presumed that the clerk later sent another notice to Marian Schillo's correct address. In support of this proposition, appellants cite several cases to the effect that a finding of jurisdiction cannot be collaterally attacked inasmuch as such recital in a decree implies that the statute was complied with. The answer to this contention is twofold. In the first place, the record contains only one certification of the clerk, which is that he mailed the publication notice to Marian Schillo at what is admittedly the wrong address. Certainly, if the clerk had subsequently mailed another notice to the correct address, he would have so certified in accordance with his duty under the statute. Appellants made no proof that the clerk mailed a second notice to the correct address, and, in the face of the plain certification of the clerk to the contrary, we see no license whatever for presuming to the contrary upon this very important point of fact and procedure. Presumptions cannot be indulged in against positive facts. The second answer lies in the proposition that this is not a collateral proceeding, as urged by appellants, but is a direct attack in that the petition to avoid the judgment is filed for that very purpose in the same action. On this point, it was said in *City of DesPlaines* v. *Boeckenhauer*, 383 Ill. 475: "A direct attack on a judgment is a proceeding instituted for the very purpose of avoiding or correcting a judgment in some particular and is brought in the same action and in the same court. (34 C. J. 520.) In *Dennison* v. *Taylor*, 142 Ill. 45, it was said: 'The judgment of a court is collaterally assailed when it is sought to be impeached in an action other than that in which it was rendered.' See also *Reizer* v. *Mertz*, 223 Ill. 555; *Long* v. *Thompson*, 60 Ill. 27, and *Moore* v. *Neil*, 39 Ill. 256. A direct attack may be made by motion or petition, as in this case, filed in the same cause in which the original judgment was entered."

It follows that the cases cited by appellants as to invulnerability of a decree when collaterally attacked have no

bearing on the issue here at hand. Even in a collateral proceeding a presumption in favor of jurisdiction will not stand when the facts of the record show to the contrary. For example, in *Sharp* v. *Sharp*, 333 Ill. 267, we held: "In case of collateral attack a presumption in favor of the regularity and validity of the decree is indulged from a statement in the decree that the court had jurisdiction of the subject matter and of the parties. Nothing will be presumed, however, in favor of jurisdiction in the face of facts appearing in the mandatory record showing that it did not exist * * * and where the record shows the evidence upon which the court acted is insufficient, the finding of the court in favor of jurisdiction is not conclusive."

A further contention is made by appellants that appellees were guilty of *laches* in not sooner moving to vacate the judgment in question. With this we cannot agree, because, in the first place, it is quite apparent that appellees used all due diligence by filing their petition within a month and one-half after they first learned of the attachment and sheriff's sale. To come from another State, obtain counsel and investigate these proceedings, could not have been done much faster in the ordinary course of affairs. Furthermore, as was stated in *Thayer* v. *Village of Downers Grove*, 369 Ill. 334: "It is a rule well established that a void judgment or order may be vacated at any time and the doctrines of *laches* and estoppel do not apply."

Finally, it is contended by appellants Grace B. Martin and Celia King that their title acquired at the sheriff's sale cannot now be attacked, because they were innocent purchasers for value. Without pausing to determine whether said appellants were, in fact, innocent purchasers for value, there is a conclusive answer in that this was simply a judicial sale where the rule of *caveat emptor* applies and the purchasers are not protected in their title by any statute. Thus, in *Rabbitt* v. *Weber & Co.*, 297 Ill. 491, where the same question was raised in a suit to set aside a deed issued in an attachment suit, we held: "In this case the person who purchased at the sale is the one who made the affidavit and had notice of its contents, and cannot be said to have occupied the relation of a stranger relying upon the judgment, whether he purchased for himself or for his client.

If he should be regarded as a stranger to the record the law presumes that all men inspect public records through which a title is derived before purchasing, and on failure to do so the law will not protect a purchaser from the consequences of purchasing under a void decree." To the same effect, see *Hutson* v. *Wood*, 263 Ill. 376.

To justify the action of the trial court in vacating the original judgment and declaring the sale and deed void in their entirety, appellees point out that if the defects in the proceedings were sufficient to deprive the court of jurisdiction over any of the appellees, the judgment is void as to all of them. Under the circumstances, this appears to be the rule applicable here, in view of cases such as *Fredrich* v. *Wolf*, 383 Ill. 638, wherein we recently set aside a confession judgment against one defendant because the other signature to the note was not genuine. Our conclusion there was by force of the following argument: "The rule has been long established that if a judgment entered as a unit against two or more defendants is so defective as to necessitate its vacation as to one defendant, it must be set aside as to all. (*Claflin* v. *Dunne*, 129 Ill. 241.) Plaintiff concedes this principle of law but refers to section 50 of the Civil Practice Act as authorizing a procedure of severing a judgment as to two or more defendants. Section 50 provides for the entry of a judgment for or against one or more of several plaintiffs and for or against one or more of several defendants, but there is no authority in that section which authorizes the setting aside of a unit judgment as to one defendant and permitting it to stand as to another. * * * After a judgment has been set aside and a new trial granted, separate judgments may then be entered against the several defendants pursuant to section 50, but when it has been entered as a unit to all the defendants, it stands or falls as to all." Likewise, in *Claflin* v. *Dunne*, 129 Ill. 241, a judgment was entered against several defendants, one of whom was dead. The motion to set aside the judgment as to all defendants was sustained by this court because of the same rule. It was a unit as to all defendants, and, being erroneous as to one, was erroneous as to all. The original money judgment herein, being void for lack of jurisdiction over the person of at least one joint defendant, the resulting

sheriff's sale and deed are likewise void and of no effect.

For the reasons hereinabove expressed, the judgment must be affirmed.

Certain Portions of Illinois Attachment Act, Ch. 11, Illinois Revised Statutes

"§ 2. Affidavit-Statement-Examination under oath

To entitle a creditor to such a writ of attachment, he or his agent or attorney shall make and file with the clerk of such court, an affidavit setting forth the nature and amount of the claim, so far as practicable, after allowing all just credits and set-offs, and any one or more of the causes mentioned in the preceding section, and also stating the place of residence of the defendants, if known, and if not known, that upon diligent inquiry, the affiant has not been able to ascertain the same together with a written statement, either embodied in such affidavit or separately in writing, executed by the attorney or attorneys representing the creditor, to the effect that the attachment action invoked by such affidavit does or does not sound in tort, also a designation of the return day for the summons to be issued in said action. * * * As amended 1935, July 10, Laws 1935, p. 210, § 1; 1939, July 19, Laws 1939, p. 289, § 1."

"§ 22. Notice by publication and mail

When it shall appear by the affidavit filed or by the return of the officer, that a defendant in any attachment suit is not a resident of this State, or the defendant has departed from this State, or on due inquiry cannot be found, or is concealed within this State, so that process cannot be served upon him, and that property of the defendant has been attached, or that persons having such property or effects, choses in action or credits belonging to defendant, or owing debts to him, have been summoned as garnishees, it shall be the duty of the clerk of the court in which the suit is pending to give notice, by publication at least once in each week for three weeks successively, in some newspaper pub-

lished in this State, most convenient to the place where the court is held, of such attachment or garnishment, and at whose suit, against whose estate, for what sum, and before what court the same is pending, and that unless the defendant shall appear, give bail, or plead within the time limited for his appearance in such case, judgment will be entered, and the estate so attached or garnisheed sold or otherwise disposed of as provided by law. And such clerk shall, within ten days after the first publication of such notice, send a copy thereof by mail, addressed to such defendant, if the place of residence is stated in such affidavit; and the certificate of the clerk that he has sent such notice in pursuance of this section, shall be evidence of that fact. (As amended 1935, July 10, Laws 1935, p. 210, § 1.)"

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of the Court Below

The opinion of the Supreme Court of Illinois (R. 62-66), March 21, 1945, is not yet officially reported. (— Ill. —, — N. E. (2d) —). Its former opinion (R. 52-59), vacated by allowance of rehearing, is not reported.

II

Jurisdiction

The date of the judgment of the Illinois Supreme Court to be reviewed is March 21, 1945. The jurisdiction of the court is invoked under § 237(b) of the Judicial Code as amended, §§ 3 and 4, Title 28, U. S. C. A., p. 206, and appears from the jurisdictional statements in the petition for certiorari.

III

Statement of the Case

The summary statement in the petition is hereby adopted as a part of this brief.

IV

Specification of Errors

1. The Supreme Court of Illinois erred in said cause in affirming the judgment appealed from, inasmuch as the latter was entered without jurisdiction and deprived the said Grace B. Martin and Celia King, and each of them, of their property without due process of law, in violation of § 1 of Article XIV of the Amendments to the Constitution of the United States.

2. The Supreme Court of Illinois erred in said cause in affirming the judgment appealed from by depriving the said Grace B. Martin and Celia King, and each of them, of their property without due process of law, in violation of § 1 of Article XIV of the Constitution of the United States, inasmuch as said judgment was entered without jurisdiction.

ARGUMENT

Believing the foregoing petition to be sufficient in itself for the most part to present petitioners' case, we will not add to that any comprehensive argument, but argument here will consist mainly of comment on the cases cited in the opinion sought to be reviewed, so far as said cases have not already been sufficiently discussed in our petition. Questions on the merits have been discussed therein and will be here only for the purpose of showing that there is no tenable nonfederal ground for the decision of the Illinois Supreme Court broad enough to sustain the decision of that court.

Cases Cited in the State Court Opinions

Cited on the proposition that because attachment is a special statutory proceeding, the affidavit for the writ must meet all essential requirements to give the court jurisdiction of the subject-matter, are several cases that do not sustain the conclusion that such jurisdiction was lacking in the instant case. Two of these cases, *Pullian* v. *Nelson*, 28 Ill. 112, and *Eddy* v. *Brady*, 16 Ill. 306, are not relevant in the slightest degree.

In *Thormeyer* v. *Sisson*, 83 Ill. 188, jurisdiction was lacking because, as pointed out in the last sentence of the opinion, the judgment there involved contained no finding of the jurisdictional fact of mailing notice and there was no other showing thereof.

In *Morris* v. *Hogle,* 37 Ill. 150, the notice was to the wrong term and the parties admitted there was no other notice, and the case holds that defects in the form of the notice (not naming the parties) are not jurisdictional.

Rabbitt v. *Weber,* 297 Ill. 491, may be distinguished from the instant case on several grounds. The affidavit there contained no statement whatever concerning residence, and for that reason was held not to give jurisdiction when sought to be relied on by the claimant, who was the attorney for the plaintiff in the attachment suit, and therefore a party to the record, and that attorney made the affidavit himself and was not a stranger to the record, purchasing in reliance on the judgment, and there was no finding in the attachment judgment of jurisdiction duly acquired. For that reason, jurisdiction was held to be lacking, although the court recognizes (p. 497) that if an affidavit contains the substantial elements of the statute and is merely defective it is amendable and the court is not without jurisdiction.

The Illinois Supreme Court was under a misapprehension with respect to the effect of a finding of jurisdiction in the judgment in special statutory proceedings and the distinction between void and merely voidable defects in such proceedings on collateral attack. At the present time, a very large portion of our court proceedings are statutory and, especially when that statutory jurisdiction is exercised according to the usual common law or chancery practice, the principles governing jurisdictional questions and collateral attack are the same in all cases. (*Drainage Dist.* v. *Highway Commrs.,* 238 Ill. 521, 524; *Vil.* v. *Homesteaders' Assn.,* 367 Ill. 508, 512; *People* v. *Ward,* 272 Ill. 65, 68; *Stack* v. *People,* 217 Ill. 220, 234; *Moore* v. *Neil,* 39 Ill. 256; *Hereford* v. *People,* 197 Ill. 222, 229; *Pierce* v. *Carleton,* 12 Ill. 358, 363-4; *Pine T. L. Co.* v. *C. S. & G.*

Exch., 238 Ill. 449, 455; *Vyverberg* v. *Vyverberg*, 310 Ill. 599, 604.)

The Illinois rule shown by the cases just cited does not differ from the federal rule.

> "The jurisdiction which is now exercised by the common law courts in this country, is, in a very large proportion, dependent upon special statutes conferring it. Many of these statutes create for the first time, the rights which the court is called upon to enforce, and many of them prescribe with minuteness the mode in which those rights are to be pursued in the courts. Many of the powers thus granted to the court are not only at variance with the common law, but even in derogation of that law.
>
> "In all cases where the new powers, thus conferred, are to be brought into action in the usual form of common law or chancery proceedings, we apprehend there can be little doubt that the same presumptions as to the jurisdiction of the court and the conclusiveness of its action will be made, as in cases falling more strictly within the usual powers of the court."
>
> *Harvey* v. *Tyler*, 69 U. S. 328, 342.

Indeed, in an action *in rem* in attachment, it is the levy which gives the court jurisdiction and defects in the affidavit, publication, or otherwise, do not defeat the jurisdiction, even though they constitute reversible error on appeal. (*Cooper* v. *Reynolds*, 77 U. S. 308, 319-21.)

While the opinion in the instant suit cites cases from other states against the validity of an affidavit stating grounds of attachment in the alternative, yet there are many decisions in other state courts *contra*. (*Haynes* v. *Powell*, 69 Tenn. 347, 352; *Van Alstyne* v. *Erwine*, 11 N. Y. 331; *Hardy* v. *Trabue*, 67 Ky. 644, 649-50; *Wood* v. *Wells*, 65 Ky. 197, 199.)

Conclusion

The judgment of which we seek a review is of such far-reaching effect that we believe the public interests would be promoted by such a review and a decision by this Court. Many innocent purchasers in Illinois and throughout the country have made their purchases in reliance upon judicial proceedings and the rule everywhere existing which the Illinois Supreme Court has disregarded in the instant suit. If those rules are to prevail no longer nobody will be safe in purchasing hereafter relying upon judicial proceedings, and in the chaos thus resulting court decisions will be meaningless. Moreover, nobody who obtains or has obtained a judgment will be secure. While the judgment itself and the findings thereof will always be preserved of record, yet if those findings mean nothing, the judgment creditor must always run the risk of loss or destruction of some jurisdictional paper from the file. Such a state of affairs ought not to be allowed to exist.

Respectfully submitted,

EDWARD H. S. MARTIN,
Attorney for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1281

GRACE B. MARTIN and CELIA KING,
Petitioners,

vs.

MARION SCHILLO, ADELE SCHILLO and DOROTHY S. FISCHER,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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THE TWENTIETH CENTURY PRESS, INC., CHICAGO

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

STATEMENT OF THE CASE.

The petitioners ask this court to review a decision of the Supreme Court of Illinois (Tr. 62-66; 60 N. E. 2d 392) construing the Illinois statute relating to attachments, and holding void a sheriff's deed issued to petitioners purporting to convey to them certain property of respondents sold on execution on a default judgment rendered against the respondents in an attachment proceeding.

The original attachment suit was filed by Edward H. S. Martin against the respondents (Tr. 1-7). They were not served with process and did not appear. The jurisdiction of the court in the attachment case to render judgment against them and to attach their property rested wholly on the statutory affidavit for attachment and upon constructive service by publication and mailing. Upon the failure of the respondents to appear and plead, judgment was entered against them in August, 1942 (Tr. 13-14). Execution and sheriff's sale followed and, there being no redemption during the statutory period, a sheriff's deed issued to the petitioners in December, 1943, purporting to convey to them the attached property (Tr. 20-21). The petitioners claim to be strangers to the proceedings although one of them is the wife of the plaintiff and judgment creditor Martin, and the other is the wife of Martin's attorney of record (Tr. 17).

Shortly after this sheriff's deed was executed, the respondents filed their petition (Tr. 16-21) in the attachment proceeding, asking that the court declare the judgment void for want of jurisdiction and set it aside, and that the court likewise declare void the execution and sheriff's sale and deed which rested upon the judgment for their validity. The petitioners, having acquired an interest under the judgment, were made parties to the petition and appeared and pleaded thereto (Tr. 25, 30-33), so that there was no question as to the personal jurisdiction of the Illinois court over them in this case.

The grounds upon which the default judgment in attachment was attacked by respondents were (so far as material here) (Tr. 12-18):

> (1) That the affidavit for attachment (Tr. 7-8) which is the foundation of the proceeding, was defective in that it stated the various statutory grounds in the alternative and thus did not state any ground positively; and

(2) That the constructive service was fatally defective because notice was mailed to one of the respondents at an address other than that set forth in the affidavit and was never received by her.

The Illinois trial court sustained both grounds and entered an order finding and declaring that the judgment was void on the face of the record, and hence that the consequent execution, sheriff's sale and deed were likewise void (Tr. 37-8).

The Illinois Supreme Court, in affirming the order of the trial court, rests its decision on the insufficiency of the affidavit for attachment, holding that in view of the fatal defects in the affidavit, it was unnecessary to consider the question raised as to the sufficiency of the service by publication and mailing (Tr. 63-66).

The controlling question in the case, therefore, was whether, under the law of Illinois, an affidavit for attachment stating the statutory grounds in the alternative, and stating no ground positively, is sufficient to give the court jurisdiction. The Illinois Supreme Court, construing the Illinois statute, held that the affidavit was not sufficient; that the defect, being apparent of record, was one of which all persons claiming under the judgment were required to take notice; and hence that the judgment and the sheriff's sale and deed were void.

The petitioners were parties to the proceedings in which the attachment judgment and the title they claimed under it were attacked. They appeared and were heard. The court decided against them, wholly on the construction of the Illinois statute. Under these circumstances, there is no ground for any serious claim that they were deprived of their property without due process of law or that any federal question is involved in this case.

ARGUMENT.

I.

THE DECISION OF THE ILLINOIS SUPREME COURT INVOLVED ONLY A CONSTRUCTION OF A STATE STATUTE AND IS NOT THEREFORE SUBJECT TO REVIEW BY THE UNITED STATES SUPREME COURT; THERE IS NO FEDERAL QUESTION INVOLVED.

The decision of the Supreme Court of Illinois rests on the construction of the following Illinois Statute (Secs. 1 and 2 of "An Act in regard to attachments in courts of record"; Ill. Rev. Stat. 1943, Ch. 11, Secs. 1 and 2):

"Sec. 1. *Causes.*

That in any court of record having competent jurisdiction, a creditor having a money claim, whether liquidated or unliquidated, and whether sounding in contract or tort, may have an attachment against the property of his debtor, or that of any one or more of several debtors, either at the time of instituting suit or thereafter, when the claim exceeds $20, in any one of the following cases:

First: Where the debtor is not a resident of this State.

Second: When the debtor conceals himself or stands in defiance of an officer, so that process cannot be served upon him.

Third: Where the debtor has departed from this State with the intention of having his effects removed from this State.

Fourth: Where the debtor is about to depart from this State with the intention of having his effects removed from this State.

Fifth: Where the debtor is about to remove his property from this State to the injury of such creditor.

Sixth: Where the debtor has within two years preceding the filing of the affidavit required, fraudulently

conveyed or assigned his effects, or a part thereof, so as to hinder or delay his creditors.

Seventh: Where the debtor has, within two years prior to the filing of such affidavit, fraudulently concealed or disposed of his property so as to hinder or delay his creditors.

Eighth: Where the debtor is about fraudulently to conceal, assign, or otherwise dispose of his property or effects, so as to hinder or delay his creditors.

Ninth: Where the debt sued for was fraudulently contracted on the part of the debtor; Provided, the statements of the debtor, his agent or attorney, which constitute the fraud, shall have been reduced to writing, and his signature attached thereto, by himself, agent or attorney.

* * * * *

"Sec. 2. *Affidavit—Statement—Examination under oath.*

"To entitle a creditor to such a writ of attachment, he or his agent or attorney shall make and file with the clerk of such court, an affidavit setting forth the nature and amount of the claim, so far as practicable, after allowing all just credits and set-offs, and any one or more of the causes mentioned in the preceding section, and also stating the place of residence of the defendants, if known, and if not known, that upon diligent inquiry the affiant has not been able to ascertain the same. * * *"

The affidavit for attachment here (Tr. 7), after stating that the defendants (respondents here) are indebted to plaintiff Martin for his fees as attorney in the amount of $2,655, sets forth as a reason for the attachment that:

"(1) Said Marian Schillo and Adele Schillo are not residents of this state, *or*

(2) Conceal themselves so that process cannot be served upon them, *or*

(3) Have departed from this state with the intention of having their effects removed from this state, *or*

(4) Are about to remove their property from this state, to the injury of said plaintiff, *or*

(5) Have, within two years prior to the filing of this affidavit, fraudulently concealed or disposed of their property so as to hinder and delay their creditors."

(Italics are ours.)

Thus five separate and distinct statutory grounds of attachment are referred to in the alternative, but the plaintiff does not swear that any of those grounds exists or is relied on.

The question before the Illinois Supreme Court was whether the foregoing affidavit complied with the statutory requirement that it set forth any one or more of the specified causes for attachment. In holding that the affidavit did not comply with the statute and that the court therefore acquired no jurisdiction to enter the judgment, the Illinois Supreme Court said (Tr. 63-66; 60 N. E. 2d 393-5):

"If the trial court in the attachment suit did not have jurisdiction of the subject matter, its judgment in that suit was void and without any effect and may be questioned at any time or place. * * *

Attachment proceedings are statutory. To give the court jurisdiction of the subject matter and the parties the statute must be strictly complied with. * * *

Attachment was unknown at the common law and, being a statutory proceeding, the affidavit required by the statute for the writ must meet all the essential requirements of the statute to give the court jurisdiction of the subject matter. (*Rabbitt* v. *Weber & Co.*, 297 Ill. 491; *Thormeyer* v. *Sisson*, 83 Ill. 188; *Pullian* v. *Nelson*, 28 Ill. 112; *Eddy* v. *Brady*, 16 (fol. 34) Ill. 306.) If an essential element of the affidavit is omitted it may not be aided by amendment, and the proceeding is without authority of law. A judgment entered when the record on its face shows want of

jurisdiction is void and of no force or effect. (*Rabbitt* v. *Weber & Co.*, 297 Ill. 491; *Booth* v. *Rees*, 26 Ill. 45.) The rule also is that a purchaser, whether he be a party to the record or a stranger, and all subsequent titleholders are chargeable with notice of the condition of the record and are not protected from the consequences of purchasing under a void judgment or decree. *Rabbitt* v. *Weber & Co.*, 297 Ill. 491; *Morris* v. *Hogle*, 37 Ill. 150. * * *

It is readily seen that the affidavit before us does not state which of the grounds therein set out is relied upon to sustain the attachment, and such cannot be ascertained. No positive statement is made whether Marion and Adele Schillo were non-residents, or concealed themselves so that summons could not be served upon them, or whether they had departed from the State with the intention of having their effects removed from the State, or had within two years fraudulently disposed of their property.

The authorities cited all held that to state separate and distinct grounds for writ of attachment in the alternative or disjunctive is not sufficient to give the court jurisdiction of the subject matter of the attachment for the reason that the affidavit does not positively state any ground.

Attachment is an action *in rem*, a statutory remedy. It is necessary, in order to give the court jurisdiction of the property sought to be attached, that the requisites of the statute be substantially complied with. If there be no such compliance, the court has no jurisdiction of the subject matter, without which any judgment entered pursuant to the levy made under authority of the writ of attachment is void and of no force. * * * The judgment and the proceedings had thereunder, including the deeds issued under the attachment and sale by the sheriff, were void."

In support of the holding that an affidavit setting forth the grounds for attachment in the alternative, was fatally defective, the court cited:

Cronin v. *Crooks*, 143 N. Y. 352; 38 N. E. 268.
Pierce v. *Boyle*, 242 Mich. 149; 218 N. W. 756.

Alvey v. *Smith*, 28 S. W. 2d (Tex. Civ. Appeal) 267.

Heaton v. *Panhandle Smelting Co.*, 32 Idaho 146 (150); 179 Pc. 510.

Rosenberg v. *Bullard*, 127 Cal. App. 315; 15 Pac. 2nd 870.

7 C. J. S. 296-7; "Attachment," Sec. 126, Par. b(2).

It thus appears that the decision involved only a construction of the Illinois attachment statute. The petitioners claimed title by virtue of proceedings under that statute. The court held that the proceedings were not in accord with the statute and hence that the petitioners derived no title. The defects complained of were of record in the case and petitioners, like any other purchasers of real estate, were bound by defects of record.

As the court said in *Rabbitt* v. *Weber & Co.*, 297 Ill. 491 (497-8), in holding void a purported title derived through a judicial sale on a judgment in attachment:

> "An attachment proceeding was unknown to the common law and is a harsh one in derogation of that law, and being wholly statutory must strictly conform to the statute. (*Haywood* v. *Collins*, 60 Ill. 328). The affidavit is the foundation of the suit, and it must meet the requirements of the statute in order to confer jurisdiction if there is no personal service or appearance by the defendant. * * * If he [the purchaser at the sale] should be regarded as a stranger to the record the law presumes that all men inspect public records through which a title is derived before purchasing, and on failure to do so the law will not protect a purchaser from the consequences of purchasing under a void decree. *Morris* v. *Hogle*, 37 Ill. 150."

Petitioners were parties to the proceedings in which the statute was construed and their title adjudicated. The court had jurisdiction over them and over the subject

matter of the litigation. There was thus no federal question involved. The Illinois court had sole right to construe the Illinois statute and to determine rights and titles claimed thereunder, and the United States Supreme Court will not review or revise the construction adopted by the Illinois court.

As was said by this court in dismissing for want of jurisdiction and holding to be frivolous an appeal from a decision of a state court construing a statute:

> "* * * it is elementary that this court is without authority to renew and revise the construction affixed to a state statute as to a state matter by the court of last record of the state."
>
> *Quong Ham Wah Co.* v. *Ind. Comm.*, 255 U. S. 445 (448).

In another case in dismissing a writ of error to a state court, this court said:

> "If this court were to assume jurisdiction of this case, it is evident that the question submitted for our decision would be, not whether the statutes of Ohio are repugnant to the Constitution of the United States, but whether the supreme court of Ohio has erred in its construction of them. It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretence that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary."
>
> *Commercial Bank of Cincinnati* v. *Buckingham's Executors*, 5 How. 317 (342-3).
>
> *Ross* v. *Oregon*, 227 U. S. 150 (161-2).

And in *Roe* v. *Kansas*, 278 U. S. 191, in refusing to review a decision of the Kansas Supreme Court construing an eminent domain statute as authorizing the con-

demnation of appellant's property, this court said (pp. 192-3):

> "This writ of error to the Supreme Court of Kansas must be dismissed. The alleged grounds therefor are so lacking in substance that they may be properly designated as frivolous. * * *
>
> Under the circumstances here revealed the construction placed upon her statutes by the Supreme Court of Kansas is binding upon us. * * *
>
> The alleged ground for the present writ is without substance and the circumstances justify the imposition of a penalty upon the party at fault."

The ground upon which application for writ of certiorari is based in the instant case is equally without substance.

II.

THE DECISION OF THE ILLINOIS SUPREME COURT IS CORRECT.

Since the decision of the Illinois Supreme Court involved only questions of local law, it is not material here whether or not that decision was erroneous. This Court will not review it in any event.

The decision of the Illinois court was, however, correct and in accord with the great weight of authority. The following brief statement of points involved and authorities supporting them sustains this last proposition.

1.

The affidavit is the foundation of the suit and it must meet the requirements of the statute in order to confer jurisdiction, particularly where there is no personal service or appearance by the defendants.

Thormeyer v. *Sisson*, 83 Ill. 188 (189).

Rabbitt v. *Weber & Co.*, 297 Ill. 491 (497); 130 N. E. 787.

2.

The affidavit is required by statute to state that some one of the grounds for attachment exists. An affidavit which alleges the grounds in the alternative in effect states no ground, and is insufficient to give the court jurisdiction over the attached property or to serve as a basis for service upon the defendants by publication and mailing of notice.

See authorities cited, pp. 7-8, ante, and also the following:

Prins v. *Hinchcliffe*, 17 Ill. App. 153.

Kegel v. *Schrenkeisen*, 37 Mich. 174.

Banker v. *Hubbard*, 24 N. Y. Supp. (2nd) 286, (288).

Dintruff v. *Tuthill*, 17 N. Y. Supp. 556, 62 Hun. 591.

Porter v. *Boehme*, 160 Minn. 127 (128), 199 N. W. 895.

Goodyear Rubber Co. v. *Knapp*, 61 Wis. 103 (105); 20, N. W. 651 (652).

Winters v. *Pearson*, 72 Calif. 553 (554), 14 Pac. 30.

Culbertson v. *Cabeen*, 29 Tex. 247 (253).

Birchall v. *Griggs*, 4 N. Dak. 305 (307).

3.

Since the requirements of the affidavit for attachment are fully provided for in the Attachment Act, the provisions of Section 43 of the Civil Practice Act, (Ill. R. S. Ch. 110, par. 167) permitting a pleading in the alternative, has no application to any question as to the sufficiency of an affidavit.

Sec. 26, Attachment Act; Ill. R. S., Ch. 11, Par. 26.

Kirk v. *Dearth Agency*, 171 Ill. 207 (213, 214); 49 N. E. 413.

4.

Even, however, if the affidavit for attachment may have some of the attributes of a pleading, it is nevertheless also an affidavit and the rules of certainty applicable to affidavits must be applied in testing its sufficiency.

Brewer & Hoffman Brewing Co. v. *Boddie,* 59 Ill. App. 45; aff'd. 162 Ill. 346; 44 N. E. 819.

5.

Since the judgment was void, the judicial sale and deed are likewise void and the purchaser and grantees acquired no interest thereunder.

Rabbitt v. *Weber & Co.,* 297 Ill. 491 (498); 130 N. E. 787.

Hutson v. *Wood,* 263 Ill. 376 (387); 105 N. E. 343.

6.

A judgment void for lack of jurisdiction in the Court to enter it is a nullity, and may be set aside on motion at any time.

Thayer v. *Village of Downers Grove,* 369 Ill. 334 (339); 16 N. E. (2d) 717.

Fredrich v. *Wolf,* 383 Ill. 638; 50 N. E. (2d) 755.

Anderson v. *Anderson,* 292 Ill. App. 421 (428); 11 N. E. (2d) 216.

We submit that the petition for writ of certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944.

No. 1281

GRACE B. MARTIN AND CELIA KING,
Petitioners,

vs.

MARIAN SCHILLO, ADELE SCHILLO AND DOROTHY S. FISCHER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

MEMORANDUM FOR PETITIONERS IN REPLY TO BRIEF IN OPPOSITION.

EDWARD H. S. MARTIN,
Counsel for Petitioners.

Midwest Law Printing Co., 310 W. Huron St., Chicago

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1. In its contention that the decision sought to be reviewed involves only a construction of a state statute and therefore is not subject to review, the brief in opposition overlooks the fact that the State Supreme Court purported to base its decision solely on the first two sections

of the Illinois Attachment Act and did not construe nor pass upon the validity of several other statutes mentioned in our petition for certiorari and supporting brief, namely, § 28 of that Attachment Act, making defects in the attachment affidavit amendable and therefore not jurisdictional, § 27 of that Act, making an attachment affidavit a pleading, § 43 (2) of the Illinois Civil Practice Act, authorizing pleading in the alternative, and Rule 2 of the Illinois Supreme Court, making that Practice Act apply in attachment suits to the extent that procedure therein is not regulated by the Attachment Act; and thereby the Illinois Supreme Court sought to evade the federal constitutional question involved in the case by purporting to base its decision on an obviously inadequate and untenable legal ground; all of which was set forth in our petition and supporting brief, and cases cited showing that the state court could not in that manner deprive the United States Supreme Court of its right to pass upon the federal constitutional question.

2. While we do not consider discussion as to the merits called for at this time, we do want to reply briefly to respondents' argument that the Illinois Supreme Court decision is correct and to refer briefly to a few of the cases cited in respondents' brief, some of them on the jurisdictional question and some of them on the merits. In our said supporting brief (p. 8) we have sufficiently distinguished *Rabbitt* v. *Weber,* 297 Ill. 491, cited by respondents (Br. 8, 10, 12) and *Morris* v. *Hogle,* 37 Ill. 150, (Resp. Br. 8). In our supporting brief (p. 30), we have also sufficiently distinguished *Thormyer* v. *Sisson,* 83 Ill. 188, (Resp. Br. 10).

The United States Supreme Court decisions cited in respondents' brief (pp. 9-10), in an attempt to show that the instant case involves only construction of a state stat-

ute and presents nothing for review on certiorari, do not have that effect at all. They are all cases where it was sought to review state statutes on the theory of their repugnancy to the federal constitution, whereas the state court had not been called upon to determine the validity of the statutes nor that question of repugnancy, but had based its decision merely on the construction of statutes which were unquestionably valid.

Brewer & H. B. Co. v. *Boddie,* 59 Ill. App. 45, cited in respondents' brief (p. 12) has nothing whatever to do with the proposition on which it is there cited. It merely holds that where two separate pleas were attempted to be verified by an affidavit alleging that the *foregoing plea* is true, the affidavit verified neither plea because it could not be told which plea it referred to and therefore no perjury had been committed.

Hutson v. *Wood,* 263 Ill. 376, cited in respondents' brief (p. 12) is not in point either on the proposition on which it is cited. It was a case involving an execution sale on a judgment by confession entered by the clerk *in vacation,* which was absolutely void because there was no affidavit of execution of the warrant of attorney and the judgment was entered for more than confessed, and besides, there was no court finding and the judgment was not a judicial act, but merely a ministerial act of the clerk.

We submit that the petition for certiorari ought to be granted.

Respectfully submitted,

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